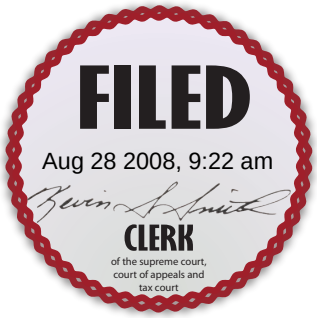

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IN THE
COURT OF APPEALS OF INDIANA

JAMES D. VICTERY,	)	
	)	
Appellant/Cross-Appellee,	)	
	)	
vs.	)	No. 49A02-0703-CV-251
	)	
CAROL D. VICTERY,	)	
	)	
Appellee/Cross-Appellant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary L. Miller, Judge
The Honorable Deborah J. Shook, Master Commissioner
Cause No. 49D05-0409-DR-1800
and
The Honorable John F. Hanley, Judge
The Honorable Christopher Haile, Commissioner
Cause No. 49D11-0409-DR-1800

August 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

In an appeal from a final decree of dissolution, James D. Victery ("Father") contends that the trial court abused its discretion by failing to divide a portion of the proceeds from the sale of certain real estate. Not only does Carol D. Victery ("Mother") disagree, but she also cross-appeals from an order modifying custody. While her overarching contention is that the court abused its discretion by modifying custody from her to Father, Mother raises several sub-issues. We restate those issues below:

I. Whether the master commissioner lacked the authority to enter judgment;

II. Whether evidence supported the findings, and in turn whether the findings supported the conclusions;

III. Whether the trial court erred by not considering evidence from collateral sources; and

IV. Whether the trial court gave sufficient consideration to the eight-year-old child's wishes about custody.

For simplicity's sake, and due to potential jurisdictional implications, we will examine Mother's issues before addressing Father's argument. We affirm.

Facts and Procedural History

In February 1995, Mother paid $45,000 for real estate on East 37th Street (the "Indianapolis property"). On June 20, 1998, she married Father, who had been a renter at her house. Diss. Tr.[1] at 148. On June 2, 1999, Mother gave birth to a son, V.V. *Id*. In July 2000, Mother purchased two parcels of real estate in Arizona. During most of their

[1] We shall refer to the transcript from the October 24, 2006 dissolution hearing as "Diss. Tr." Excerpts from the December 12, 2007 custody modification hearing shall be referred to as "Cust. Mod. Tr."

marriage, the couple lived at the Indianapolis property, which remained titled in Mother's name.

In 2004, the parties separated. On September 29, 2004, Father filed a petition for dissolution in Marion Superior Court. *Id*. at 49, 153, 195. Per an agreed provisional order, Mother was given physical custody of V.V. In the fall of 2005, Mother filed a petition to sell the Arizona parcels. The petition was granted, the parcels were sold, and proceeds of $13,668 were generated.

In May 2006, Mother filed a petition to sell the Indianapolis property. Although the Indianapolis property was originally listed on May 8, 2006 for $105,284, the list price was changed to $150,000 per an amendment to the listing contract. Appellant's App. at 64-68. A purchase agreement, dated May 12, 2006, reflected a total purchase price of $150,000. *Id.* at 69. The May 31, 2006 settlement statement noted $150,000 as the "gross amount due to seller," $72,630.62 as the cash amount due to seller, and $22,500 as "seller second mortgage." *Id.* at 61. Mother received net proceeds of $50,414.62 in the form of a check, which she deposited in her bank. Appellant's Addendum to Br. at 22-23; Diss. Tr. at 192-93. When the funds were available, she sent them to her attorney, who in turn arranged for them to be deposited in a trust account. *Id*. at 23-24.

On October 24, 2006, Commissioner Christopher Haile presided over a final hearing. By then Mother had relocated to California, while Father remained in Indiana. On November 9, 2006, the court entered a decree of dissolution, which provided, *inter alia*:

> 5. It is in the best interest of the child that [Mother] has sole custody of [V.V.].
> 6. [Father] should have parenting time with the child as provided by the Indiana Parenting Time Guidelines when parents reside in different states and at other reasonable times as the parties may agree or he is visiting the State of California.
> ….
> 11. [Father] should pay $76.28 per week child support.
> ….
> 13. The Court anticipates that [V.V.] will travel to Indianapolis by air three times per year for parenting time with his father [and Mother will pay for two of those visits].
> ….
> 15. The parties should communicate the arrangements in a timely manner.
> 16. The Court finds that the presumption of an equal division of the parties' property and assets has not been rebutted in this case.
> 17. [Mother] received $13,332.62 from the sale of property in Arizona and failed to divide it with [Father] as previously ordered.
> 18. [Father] has a child support arrearage of $2,375.00 and the parties had previously agreed that the arrearage would be satisfied out of his share of the Arizona sale proceeds.
> 19. [Mother] sold the [Indianapolis property] and received the sum of $50,414.62 which has been deposited in the trust account of attorney Richard Clem.
> 20. The funds in the Clem trust account should be divided as follows: [Father] should receive $29,498.62 and [Mother] should receive $20,916.00.
> ….
> IT IS THEREFORE ORDERED:
> ….
> 3. [Father] shall have parenting time with [V.V.] as follows: one week at Christmas; one week at Spring Break; seven weeks in the summer; reasonable times in the state of California; any other time that the parties shall agree.

Appellant's App. Vol. I at 22-24 (decree signed by both Commissioner Haile and Judge John Hanley).

Thereafter, V.V. lived with Mother in California, and Father exercised visitation. Disagreement arose regarding the arrangements for visitation, as well as the length and

frequency thereof. *See, e.g., id*. at 12-14. Indeed, within a month of the entry of dissolution, Father filed a petition challenging visitation. The parties apparently resolved that first dispute. However, in January 2007, the court approved Father's emergency petition for rule to show cause for Mother's alleged denial of parenting time and also set a compliance hearing for May 2007. In February 2007, Father initiated his appeal from the dissolution decree.

By mid-March, Father had filed two more petitions regarding parenting time. On March 27, 2007, the court denied both petitions. On April 17, 2007, Father filed a motion for automatic change of judge and a petition to modify custody/parenting time. *Id*. at 14. After each party struck a judge, they agreed upon the appointment of Judge Gary L. Miller. Around that same time, Father filed a motion to suspend his dissolution appeal. In May 2007, we granted Father's motion, thereby suspending his dissolution appeal[2] until the custody modification issue could be resolved; in addition, we ordered Father to file periodic status reports.

Visitation disputes continued to occur. On June 27, 2007, per a request from Father, Dr. Richard Lawlor performed a custody evaluation/update[3] during which he met with Father. Financial considerations prevented Mother from leaving California and her job to meet again with Dr. Lawlor in Indiana. However, Mother spoke on the phone with

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[2] The notice of completion of clerk's record was filed on April 12, 2007.

[3] Dr. Lawlor had completed custody evaluations regarding V.V. in October 2005 and again in July 2006. Cross-Appellant's App. at 138-49. Following the October 2005 evaluation, Dr. Lawlor had recommended that Mother have custody of V.V. Following the July 2006 updated evaluation, the court awarded Mother custody of V.V.

Dr. Lawlor and sent him a variety of documents in support of her position. In November 2007, Father remarried.

Despite the appointment of Judge Miller, Master Commissioner Deborah J. Shook presided over a custody modification hearing held on December 12, 2007, and she requested proposed findings and conclusions. On December 19, 2007, the parties filed a joint request for an extension of the appellate stay. On January 8, 2008, the extension was granted through whichever date the lower court issued an order regarding the custody modification issue.

On February 11, 2008, the court entered a twenty-nine-page Findings of Fact, Conclusions of Law and Judgment on Petition for Modification of Custody. In the order, which was signed by Master Commissioner Shook, custody was changed from Mother to Father. The very next day, Mother filed her notice of appeal of the custody modification, and a motion was filed for an emergency hearing regarding the stay. Neither Judge Miller nor Master Commissioner Shook was available until February 19, 2008. On February 26, 2008, the notice of completion of clerk's record for the custody modification appeal was filed. Although the dissolution appeal and the custody modification appeal were originally assigned two separate cause numbers (49A02-0703-CV-251 and 49A02-0802-CV-122, respectively), we consolidated them via order on March 7, 2008.

On April 7, 2008, Father filed his appellant's brief. On May 7, 2008, Mother timely filed her cross-appellant/appellee's brief. On June 9, 2008, Father timely filed his

cross-appellee's brief[4] and an appendix. On June 10, 2008, Father filed a motion to submit a corrected brief, noting the following mistakes: two of the pages had been printed and bound upside down, and a proof-reading mark had been left on two pages. On June 26, 2008, the motions panel of this Court granted Father's motion. On June 27, 2008, Mother filed her cross-appellant/appellee's reply brief, a motion for oral argument, and a motion to strike Father's corrected brief and appendix. On July 1, 2008, Mother filed a "supplemental" motion to strike Father's corrected brief and to vacate this Court's June 26, 2008 order.

Discussion and Decision

I. Preliminary Issues and Master Commissioner's Authority

Before delving into Mother's challenge to Master Commissioner Shook's authority, we must address Mother's supplemental motion to strike, motion to strike, and motion for oral argument. In her supplemental motion to strike, Mother claims that she did not receive a service copy of Father's motion to file corrected brief, and she asserts that this Court granted Father's motion prior to the expiration of time within which she could file her response. Mother is correct that assuming Father mailed a copy of the June 10, 2008 motion to her, she should have had until June 30, 2008 to respond.[5] Accordingly, our June 26, 2008 order was issued somewhat prematurely. However, we

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[4] This brief also served as Father's reply brief to Mother's original appellee's brief.

[5] This would include fifteen days per Indiana Appellate Rule 34(C), plus three days per Indiana Appellate Rule 25(C), plus two more days because the eighteenth day fell on a Saturday. *See* Ind. Appellate Rule 25(A).

will not automatically strike Father's corrected brief and/or appendix but instead will examine the issues anew with consideration given to Mother's June 27, 2008 submissions.

Mother's original motion to strike Father's corrected brief was premised in part upon the assertion that his corrected brief was submitted one day late. That is, even factoring in three extra days for service by mail, June 9, 2008 was the last day upon which Father's brief or a corrected brief could have been timely filed. *See* Ind. Appellate Rules 25(C), 45(B). While we agree that Father's corrected brief was one day late, we note that the changes within his brief are not substantive and only serve to make the brief easier for us to read. Accordingly, we again exercise our discretion to permit the amended/corrected brief. *See* Ind. Appellate Rule 47 (noting that we "may grant leave for a party to amend a brief"). We further note that Mother has not demonstrated any prejudice to her by our denial of her motion to strike Father's corrected brief.

The more interesting question raised within Mother's motion is whether Father's appendix, which was timely filed on June 9, 2008, should be stricken. Father's five-page appendix contains two items: (1) Judge Miller's June 6, 2008 order "granting [Father's] motion for order directing clerk to correct chronological case summary [CCS]," and (2) the actual corrected CCS entries. Apparently, upon receiving Mother's appellate brief, in which she strenuously challenges Master Commissioner Shook's right to hear/decide the custody modification, Father filed with the lower court a motion for order directing the clerk to correct both the CCS and Judge Miller's schedule to reflect that Judge Miller was unavailable and did properly appoint Master Commissioner Shook. In her motion to

strike Father's appendix, Mother contends that the trial court lacked jurisdiction to either "correct" the CCS or enter its June 6, 2008 order because the notice of completion of clerk's record was filed on February 26, 2008. Hence, she argues, this Court, rather than the trial court, had jurisdiction.

Under Indiana Appellate Rule 8, we acquire jurisdiction over an appeal on the date the trial court clerk issues the notice of completion of clerk's record. It is well established that the trial court is deprived of further jurisdiction when appellate jurisdiction is acquired. *Walker v. Cuppett*, 808 N.E.2d 85, 91 (Ind. Ct. App. 2004); *see also Inlow v. Henderson, Daily, Withrow & Devoe*, 804 N.E.2d 833, 838 (Ind. Ct. App. 2004). Although Appellate Rule 8 precludes a trial court from "intermeddl[ing] with the subject-matter of the appeal," there are situations in which a trial court may retain jurisdiction and act notwithstanding an appeal. *Bradley v. State*, 649 N.E.2d 100, 106 (Ind. 1995). These situations include reassessing costs, correcting the record, and enforcing a judgment. *Id*. Regarding corrections, Indiana Appellate Rule 60(A) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time before the trial court clerk issues its Notice of Completion of Clerk's Record. Such corrections may be made by the trial court on its own initiative or on the motion of any party and after such notice, if any, as the court orders. *After the filing of the Notice of Completion of Clerk's Record, such mistakes may be so corrected with leave of the court on appeal*.

(Emphasis added).

Here, three notices of completion of clerk's record were filed: (1) the first on April 12, 2007 for the dissolution appeal, (2) the second on February 26, 2008 for the custody modification appeal, and (3) the third, an "amended" one dated June 9, 2008.[6] Obviously, if we use the June 9, 2008 date, then Mother's challenge to the trial court's jurisdiction fails. That is, if we did not acquire jurisdiction until *after* the notice of completion of clerk's record was filed on June 9, then clearly the trial court still had jurisdiction to correct the omissions in its records when it did, and Father's appendix should not be stricken. However, given the "amended" status of that notice and the fact that our docket contains several entries beginning long before June 9, 2008, it does not seem intellectually honest to dispose of the matter this way.

Rather, the key date appears to be February 26, 2008, the day on which the notice of completion of clerk's record was filed in the appeal of the custody portion of what is now a consolidated appeal. As the various appellate docket entries indicate, at least from that date forward, this Court has been exercising jurisdiction over this case. Accordingly, we must ask whether the trial court's additions to its CCS constituted prohibited intermeddling with the subject-matter of the appeal or whether the court's action was a permissible correction of the record. *See Bradley*, 649 N.E.2d at 106. In making our decision, we find it particularly helpful to recall the reason behind the relevant rule. Appellate Rule 8 "facilitates the orderly presentation and disposition of appeals and

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[6] Within the CCS, an entry stating "notice of completion of clerk's record – transcript completed and filed with clerk – amended" and dated June 9, 2008, appears beneath a June 12, 2008 entry and above a June 26, 2008 entry.

prevents the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment." *Southwood v. Carlson*, 704 N.E.2d 163, 165 (Ind. Ct. App. 1999).

The June 6, 2008 order concerns neither the division of the proceeds from the sale of the Indianapolis property nor the question of custody modification, the issues at the heart of this case. Rather, the order signed by Judge Miller directs the trial court clerk to "immediately correct" the CCS to reflect that Judge Miller was "unavailable, as a result of other trial settings over which he presided, to hear the final contested custody hearing scheduled on December 12, 2007, and that Comm'r Deborah Shook was appointed to conduct such hearing." Cross-Appellee's App. at 3. Judge Miller's order further clarifies that he was "out of the continental United States on February 6, 2008," and that Master Commissioner Shook "was appointed to issue the ruling handed down in open court on February 6, 2008." *Id*. at 3-4. This information should have appeared in the CCS originally. Moreover, in light of the February 26, 2008 filing of the notice of completion of clerk's record, Father should have sought leave from this Court prior to requesting the trial court to correct its records. For her part, Mother should have raised the issue earlier, rather than waiting until long after the hearing and after entry of the order to note the irregularities. Had she done so, any correction and/or clarification could have been accomplished in a more timely fashion.

In any event, the correction of the CCS did not create the "confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment," as would have been the case if Judge Miller had weighed in on the

property division and/or custody modification at this late stage in the proceedings. *See Southwood*, 704 N.E.2d at 165. Instead, Judge Miller simply confirmed that Master Commissioner Shook was properly authorized to hear the case and to issue the resulting order. As such, the policies that underlie the rule requiring leave from this Court to correct trial court records are absent in the present case. *See Donahue v. Watson*, 413 N.E.2d 974, 975 (Ind. Ct. App. 1980). Hence, while we acknowledge that when in doubt, the better practice is to seek leave, we deny Mother's motion to strike Father's Cross-Appellee's Appendix under the unique circumstances presented here. In addition, we deny Mother's motion for oral argument today by separate order.

Turning next to Mother's challenge to Master Commissioner Shook's authority to hear the case or issue the ultimate order, we seriously question whether the issue has been preserved. That is, Mother's complete failure at the trial court level to raise any issue regarding Master Commissioner Shook's authority to hear the case or issue the ultimate order arguably waives the issue on appeal. *See Floyd v. State*, 650 N.E.2d 28, 32 (Ind. 1994) ("The proper inquiry for a reviewing court when faced with a challenge to the authority and jurisdiction of a court officer to enter a final appealable order is first to ascertain whether the challenge was properly made in the trial court so as to preserve the issue for appeal.").

Waiver notwithstanding, we observe that Mother's challenge is two-pronged. The first part, whether Master Commissioner was appointed by Judge Miller to hear the case, is easily decided now that we have denied Mother's motion to strike Father's Cross Appellee's Appendix. Specifically, the amended CCS clearly indicates that Judge Miller

appointed Master Commissioner Shook to hear the December 12, 2007 final custody hearing because other trial settings made him unavailable. Cross-Appellee's App. at 3.

We reach a similar conclusion regarding the second part of Mother's challenge to Master Commissioner Shook's authority, whether Judge Miller approved the judgment or final order. That is, according to the now-amended CCS, Judge Miller notes that he was out of the country on February 6, 2008, "the date this court's findings of fact, conclusions of law and judgment were issued," and that "Comm'r Deborah Shook was appointed to issue the ruling in open court" on that date. *Id*. By appointing Master Commissioner Shook to issue the ruling in open court, Judge Miller authorized her to make the findings and conclusions. If Judge Miller did not mean to authorize Master Commissioner Shook to issue the ruling and accompanying findings and conclusions, or if Judge Miller did not approve of the final order, presumably Judge Miller would not have signed the order amending the CCS. Given these facts, to remand for Judge Miller to sign the twenty-nine page order at this point would be a waste of judicial resources. *See also Baniaga v. State*, 2008 WL 3009681, at *1 n.1 (Ind. Ct. App. Aug. 6, 2008) (discussing power of master commissioner).[7]

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[7] Although the Baniaga case concerned a criminal rather than civil matter, its first footnote contains a useful brief discussion regarding master commissioners, which we excerpt below:

> Master Commissioner Patrick Murphy heard this case and signed the abstract of judgment. Indiana Code section 33-33-49-16(e) provides that a "master commissioner shall report the findings in each of the matters before the master commissioner in writing to the judge or judges of the division to which the master commissioner is assigned." However, the statute also provides that a master commissioner has the powers and duties prescribed for a magistrate under Indiana Code section 33-23-5-5, including the power to enter a final order, conduct a sentencing hearing, and impose a sentence on a person convicted of a criminal offense. Given the manner in which these statutes have evolved in conjunction with the authority specifically granted by Indiana Code section 33-23-5-5,

II. Discretion, Findings, Conclusions

Mother next argues that the court abused its discretion by considering neither V.V.'s best interest nor any of the statutory factors required to modify custody. She claims that the court switched custody to Father as a way to punish Mother for her interpretation of an "ambiguous" portion of the November 2006 dissolution decree. Specifically, Mother asserts that she adhered to the unambiguous portions of the court's orders, but that she and Father disagreed regarding what constituted "reasonable" visitation in California.

We review custody modifications for abuse of discretion, with a preference for granting latitude and deference to our trial judges in family law matters. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (citing *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993) (affirming trial court judgment shifting primary custody of children to father)). Long ago, our supreme court explained the reason for this deference as follows:

> While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965) (footnote omitted); *see also Pawlik v. Pawlik*, 823 N.E.2d 328, 329 (Ind. Ct. App. 2005) (emphasizing the

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> we believe that section 33-33-49-16(e) means that a master commissioner must keep the judge apprised regarding the matters before him, but not that the judge needs to approve by signature the master commissioner's statutorily authorized actions.

value of trial court's close proximity where courts are often called upon to make "Solomon-like decisions in complex and sensitive matters"), *trans. denied*. Therefore, on appeal it is not enough that the evidence "might" support some other conclusion, but it must "positively require the conclusion contended for by appellant before there is a basis for reversal." *Brickley*, 247 Ind. at 204, 210 N.E.2d at 852.

Additionally, where, as here, the trial court entered findings and conclusions pursuant to Indiana Trial Rule 52, we apply the following standard of review:

> [W]e must first determine whether the evidence supports the findings and second, whether the findings support the judgment. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence [n]or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007) (citations omitted).[8]

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[8] Notwithstanding the general standard of review for Trial Rule 52 cases, where the court's findings and conclusions constitute verbatim reproductions of a party's proposed findings and conclusions, cautious appellate scrutiny may be justified. *Stevens v. State*, 770 N.E.2d 739, 762 (Ind. 2002). Our supreme court has stated:

> It is not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party. The trial courts of this state are faced with an enormous volume of cases and few have the law clerks and other resources that would be available in a more perfect world to help craft more elegant trial court findings and legal reasoning. We recognize that the need to keep the docket moving is properly a high priority of our trial bench. For this reason, we do not prohibit the practice of adopting a party's proposed findings. But when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court. This is particularly true when the issues in the case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony.

Prowell v. State, 741 N.E.2d 704, 708-09 (Ind. 2001). In the present case, we cannot tell from the materials submitted on appeal whether Mother and/or Father filed proposed orders, let alone how closely the final order might track any proposed order. In any event, the critical inquiry remains whether such

"In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered." *Kirk*, 770 N.E.2d at 307. "The court may not modify a child custody order unless: (1) the modification is in the best interests of the child; *and* (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8[.]" Ind. Code § 31-17-2-21(a) (emphasis added). "In making its determination, the court *shall* consider the factors listed under section 8 of this chapter." Ind. Code § 31-17-2-21(b) (emphasis added). Section 8 of that chapter provides:

> The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
> (2) The wishes of the child's parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) *The interaction and interrelationship of the child with:*
> (A) *the child's parents*;
> (B) the child's siblings; and
> (C) any other person who may significantly affect the child's best interest.
> (5) The child's adjustment to the child's
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.

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findings and conclusions, as adopted by the court, are clearly erroneous. *See In re Marriage of Nickels*, 834 N.E.2d 1091, 1096 (Ind. Ct. App. 2005).

> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Ind. Code § 31-17-2-8 (emphases added).

Contrary to Mother's assertions, the court did focus on V.V.'s best interests and did consider all relevant factors listed in Indiana Code Section 31-17-2-8. In fact, the court zeroed in one in particular: the interrelationship issue. The court cited the Preamble to the Indiana Parenting Time Guidelines ("IPTGL"), which notes the IPTGL's premise: it is usually in a child's best interests to have frequent, meaningful and continuing contact with each parent. Cust. Mod. Order at 16, Concl. 92. The court also cited the IPTGL's Child's Basic Needs, including the need to develop and maintain an independent relationship with each parent, to have the continuing care and guidance from each parent, and to enjoy regular and consistent time with each parent. *Id.* at 17, Concl. 93. The court concluded that Mother "consistently fails to recognize and address VV's basic needs under" the IPTGL. *Id*. at 17, Concl. 94. The court made numerous findings and conclusions detailing how Mother has been thwarting frequent, meaningful, and continuing contact between V.V. and Father, thereby negatively affecting V.V.'s best interests and the interrelationship of V.V. with Father. We include a sampling of the unchallenged findings and conclusions below:

> 26. Dr. Lawlor recommended that Mother receive custody of VV in 2005, but expressed concern about that recommendation because of the hostility between the parents and the potential for Mother's undermining of Father's relationship with VV. He further recommended that Father receive more parenting time than contemplated by the [IPTGL].
> 27. Before Mother's move to California, Father was exercising parenting time with VV for six days every two-week period, with parenting time on

Tuesday evening or overnight and Thursday evening or overnight and on alternate weekends and all other time permitted by the [IPTGL].

….

30. Dr. Lawlor's 2006 evaluation recommended that VV remain in Indiana with Father based on Dr. Lawlor's continued concern about Mother's undermining of Father's relationship with VV, and Mother's plans to relocate to California.

….

47. Father permitted liberal telephone contact between VV and Mother while VV was in Father's physical care.

….

52. Father noticed an increased reluctance in VV during his visits in California. VV's affect, mood, and affection toward Father was positive while VV visited Father in Indiana.

….

71. Father provided VV with a cellular telephone for the explicit purpose of maintaining telephone contact between Father and child; however, Mother prohibited VV from using that cellular telephone while in her care, yet called the telephone to speak with VV while VV is in Father's care.

72. Despite advanced notice to Mother that Father will be traveling to California to see VV, Father was able to see VV for only forty-seven (47) hours out of the sixty-three (63) days he was in California during the period of December, 2006 through August, 2007. [Exact days and hours detailed in subsequent finding.]

….

76. Mother offered no evidence that her or the child's safety and security were at risk.

77. Mother filed nothing post-dissolution to restrict Father's parenting time based on her concerns for VV's safety and security.

78. Mother denied Father overnight parenting time with VV while in the State of California until Father obtained a specific Court Order mandating over-nights.

79. Father was required to file for specific court orders regarding his access to VV before Mother would permit Father to see VV for more than a couple of hours in California. Specifically, Father was required to seek court intervention to receive parenting time in November 2007 for Thanksgiving, the updated custody evaluation, and Father's wedding. He was also required to seek court intervention to receive parenting time for the full period of Spring Break, which includes both weekends under the IPTGL; for the Christmas holiday in 2006, and, Father was required to secure a court order to permit him to pick up VV from school when visiting in California.

80. Mother has unilaterally changed Father's parenting time and often refused to respond to Father's request for time with VV while Father planned to be in California, despite this Court's order that she respond to the emails within seventy-two (72) hours.

81. Father had requested certain dates for his Christmas, 2006 parenting time with VV; Mother changed those dates without notice to Father and delivered the child early and required that VV be returned early, eliminating the opportunity for VV to spend time with his half-brother, Hymme. Father had given Mother advanced notice of Hymme's arrival date. As a result of Mother's change, Father was unable to spend Christmas Eve or Christmas Day with VV. Father is Catholic and practices Christian holidays, while Mother is Jewish and does not observe Christmas.

….

96. Mother fails to keep Father advised of her home and work address and her work telephone number [thereby violating IPTGL Sect. I(A)(1)].

….

98. Mother limits and controls telephone contact between Father and VV; she has failed to have VV return all of Father's calls, and she interferes with their telephone calls by cutting them short without an articulated reason [thus violating IPTGL Sec. I (A)(3)].

….

100. Mother failed and refused to provide Father with VV's school reports, and in particular, his standardized testing results. She interfered with Father's right to communicate with school personnel about VV by providing the school with copies of protective orders which were either ordered dismissed, dismissed or incomplete [in violation of IPTGL Sect. I(D)(1)].

….

103. …. Mother fails and refuses to permit liberal or reasonable parenting time to Father while he is in California [contrary to IPTGL Sect. III(5)].

….

113. Mother's ongoing actions to prevent Father access to VV place VV's welfare at risk.

….

117. There have been substantial and continuing changes in circumstances which warrant a modification of custody; such modification is in VV's best interests.

….

119. The changes in circumstances that warrant the modification of custody in this case are not inconsequential to VV and his continued development as a healthy, emotionally balanced, and well-rounded individual.

….

> 121. Mother's actions unreasonably interfere with VV's interaction and interrelationship with Father and Father's family [thereby violating Ind. Code § 31-17-2-8 (4)(A)].
> ….
> 123. A parent's interference with the other parent's access to a child has long-term, negative effects.
> ….
> 128. The potential impact of changing VV's custody from Mother to Father is minimal, whereas the actual impact upon VV remaining in Mother's care is detrimental to VV's best interests as a result of her ongoing attempts to alienate Father and Father's family from VV's life.
> 129. The potential impact upon VV from Mother's actions as described throughout these findings places the child's welfare at risk and constitutes changes in circumstances which are not only substantial but also continuing.
> 130. Mother's repeated attempts to limit VV's physical contact with his Father, her efforts to control and limit Father's telephone contact and scheduling of parenting time, her negative portrayal of Father to school officials and others in an effort to prevent Father's interaction with VV's education, constitutes substantial changes in circumstances which are continuing.
> 131. Mother's behavior and extreme animosity toward Father puts the child's well-being at stake.…
> 133. Mother's conduct in this case is an egregious violation of the custody and parenting time order, as well as the permanent injunction issued by this Court, all of which undermine Father's relationship with the child [citation omitted].
> ….
> 146. Mother presented no evidence that Father is a threat to VV in any way.

Id. at 17-26.

Father has shown far more than isolated acts of misconduct by Mother. *Cf. Wallin v. Wallin*, 668 N.E.2d 259, 261 (Ind. Ct. App. 1996) (noting that generally, "the noncustodial parent must show something more than isolated acts of misconduct by the custodial parent to warrant a modification of child custody"). Rather, he has demonstrated that Mother has engaged in ongoing and unwarranted efforts to impede the

interaction and interrelationship of V.V. with Father. The resultant erosion of the bond between the child and his non-custodial parent runs contrary to the best interests of V.V.[9] As we recently noted, "[f]ostering a child's relationship with the noncustodial parent is an important factor bearing on the child's best interest and, ideally, a child should have a well-founded relationship with each parent." *In re Marriage of Kenda and Pleskovic*, 873 N.E.2d 729, 739 (Ind. Ct. App. 2007), *trans. denied.* "When the custodial parent denies visitation rights to the other parent without evidence that the noncustodial parent is a threat to the child, it may be proper based upon the circumstances for the trial court to modify custody." *Id*.; *see also Hanson v. Spolnik*, 685 N.E.2d 71, 78 (Ind. Ct. App. 1997), *trans. denied*. The circumstances here support the court's modification.

As for Mother's contention that she simply misinterpreted the dissolution decree's visitation provisions, we are unconvinced. The pertinent paragraphs provide:

> Finding 6. [Father] should have parenting time with the child as provided by the Indiana Parenting Time Guidelines when parents reside in different states and at other reasonable times as the parties may agree or he is visiting the State of California.
>
> Order 3. [Father] shall have parenting time with [V.V.] as follows: one week at Christmas; one week at Spring Break; seven weeks in the summer; reasonable times in the state of California; any other time that the parties shall agree.

Appellant's App. Vol. I at 22-24. Any ambiguity raised by the dissolution decree's use of the term "reasonable" should have been resolved by referring to the IPTGL as well as to past practices. For instance, "[w]hen the non-custodial parent is in the area where the

[9] Though our focus today is upon the best interests of the child, we note that such unjustified interference also violates the long recognized right of parents to visit their children. *See McCauley v. McCauley*, 678 N.E.2d 1290, 1292 (Ind. Ct. App. 1997), *trans. denied*.

child resides, or when the child is in the area where the non-custodial parent resides, *liberal parenting time shall be allowed*." IPTGL Sect. III (5) (emphasis added). Mother offered anything but liberal parenting time.[10]

We reiterate that on appeal, it is not enough that the evidence might support some other conclusion. *Kirk*, 770 N.E.2d at 307. Rather, the evidence must positively require the conclusion contended for by the appellant before there is a basis for reversal. *Id*. Thus, while we may have reached a different decision had we been the court below, we cannot say that the record contains no facts or inferences to support it. *See Webb*, 868 N.E.2d at 592. Without reweighing the evidence or assessing the credibility of witnesses we have never seen, we cannot say that the record leaves us with the firm conviction that a mistake has been made. *Id*.; *see also Haley v. Haley*, 771 N.E.2d 743, 750 (Ind. Ct. App. 2002) (holding that the trial court did not err by modifying custody); *Williamson v. Williamson*, 825 N.E.2d 33, 42 (Ind. Ct. App. 2005) (holding that deterioration of child's relationship with parent warranted modification of custody). In reaching this decision, we appreciate the tremendous difficulties inherent in custody cases.

III. Collateral Source Evidence

In formulating his custody evaluation report, Dr. Lawlor reviewed and relied upon, *inter alia*, various documents that Mother collected and submitted to him. The referenced documents included letters from various friends, teachers, relatives, etc., who were supportive of Mother's case. Mother contends that while the collateral source

[10] We acknowledge the unfortunate reality that oftentimes dissolutions become so acrimonious that it is nearly impossible for the parties to agree upon the reasonableness of anything. That said, we sincerely hope that parents make every effort to truly focus on the *child*'s best interests.

documents may not have been admissible as exhibits, Dr. Lawlor's testimony regarding them should have been admitted. She asserts that the court erred by not considering such testimony.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Absent some exception, hearsay is generally inadmissible, thereby preventing the introduction of unreliable evidence that cannot be tested through cross-examination. *See* Ind. Evidence Rule 803; *Serrano v. State*, 808 N.E.2d 724, 727 (Ind. Ct. App. 2004), *trans. denied*. Yet, "[e]xperts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Ind. Evidence Rule 703; *Mundy v. Angelicchio*, 623 N.E.2d 456, 463 (Ind. Ct. App. 1993). However, this does not change the inadmissibility of the actual materials themselves. *See Faulkner v. Markkay of Indiana, Inc.*, 663 N.E.2d 798, 801 (Ind. Ct. App. 1996), *trans. denied*.

The hearsay nature of the letters is not seriously disputed by Mother. Presented with no argument that an exception to the hearsay rule applied, the court properly did not admit the actual letters into evidence. As for the testimony of Dr. Lawlor, Mother and Father stipulated that he was an expert in custody matters. They also stipulated to the admission of his custody report, which contained summaries of each collateral source submission. Cust. Mod. Tr. at 100; Cross-Appellant/Appellee's App. at 144-48. Dr. Lawlor testified that custody evaluators often rely upon letters and statements from collateral sources during the evaluation process. Thus, Dr. Lawlor could testify regarding

collateral source evidence, and such testimony would be admissible. As we highlight below, Dr. Lawlor did in fact testify regarding information gleaned from collateral sources.

Dr. Lawlor testified that in making his custody report, he "reviewed and factored in" proffered letters from the following individuals: a teacher at V.V.'s school, V.V.'s maternal grandfather, parents of a classmate of V.V., a neighbor, Mother's employer, and V.V.'s dentist. Cust. Mod. Tr. at 130-37. More specifically, he agreed that some of what the teacher said in her letter was inconsistent with what Father had told Dr. Lawlor during the evaluation process. *Id.* at 132. Dr. Lawlor also testified that one of Mother's references was "very supportive" of Mother's interactions with V.V. *Id.* When asked by Mother's counsel, Dr. Lawlor also provided his opinion about a dental situation that arose regarding V.V. and about which a letter from a dentist had been submitted. *Id.* at 135-36. Dr. Lawlor did make it clear that he weighed the various submissions differently depending on potential bias. *Id.* at 170-71.

Father's counsel did not object to any questions Mother's counsel asked of Dr. Lawlor regarding information from collateral sources. Thus, Mother has presented no indication that her examination of Dr. Lawlor regarding collateral source evidence was curtailed. Moreover, we have no reason to believe the court did not weigh or consider Dr. Lawlor's responses to the questions that were raised by Mother's counsel regarding collateral source evidence. Accordingly, we see no error, let alone reversible error, in this regard.

IV. Consideration of V.V.'s Wishes

Citing *Sabo v. Sabo*, 858 N.E.2d 1064, 1070 (Ind. Ct. App. 2006), Mother challenges the weight the court gave to V.V.'s wishes regarding custody. She maintains that despite V.V.'s age, his desire to be with Mother is not "completely irrelevant for the purposes of a custody determination." Cross-Appellant/Appellee's Br. at 37.

Within Conclusion #134, the court cited *Lasater v. Lasater*, 809 N.E.2d 380, 398 (Ind. Ct. App. 2004), for the proposition that a "child's desires regarding custody and parenting time are not controlling where the child is under the age of fourteen." Pursuant to Indiana Code Section 31-17-2-8, a court "shall consider all relevant factors, including" the wishes of the child, "with more consideration given to the child's wishes if the child is at least fourteen" years old. In *Lasater*, we stated that a finding that the wishes of a child are "not controlling" is an inartful way of stating that "less consideration would be given" to the wishes of a child under the age of fourteen. 809 N.E.2d at 398. This is consistent with *Sabo*. 858 N.E.2d at 1070 (noting that the statutory language "merely provides that a child's wishes are to be given *more* weight in the court's balancing of factors if the child is at least fourteen years. Thus, A.S.'s desire to live with Mother was entitled to some consideration by the court.").[11]

We have no reason to believe the court here completely discounted eight-year-old V.V.'s wishes. To the contrary, the court found that V.V. has a close and positive relationship with his Mother. Cust. Mod. Order at 8. However, the court also determined

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[11] We note that in *Sabo* the statute at issue involves custody *following determination of paternity*. *See* Ind. Code § 31-14-13-2. However, the pertinent language and the purposes behind that statute are sufficiently similar to those in Indiana Code Section 31-17-2-8 that we understand Mother's use of *Sabo* for persuasive purposes.

that V.V. has an excellent relationship with his Father and his Father's wife, that he loves both parents, that V.V. would like to spend equal time with his parents, and that V.V. is a "little boy who wants to have access to both parents." *Id.* at 9, 24. Dr. Lawlor's report vividly illustrates V.V.'s conflicted wishes:

> When I talked with [V.V.] at this point in November, he knew his parents were still fighting over custody, and he still wanted to "sort of" live in Indiana, but only if his mother could move back here. He noted his dad did not want to move [to] California. He thought his mother would come back to Indiana so that he could see his friends, and she could see her friends, but "she just doesn't want to be here because my dad's here."
>
> [V.V.] was happy that he was now going to have a little brother, and he thought that if he lived in Indiana, he would be there to set a good example for his little brother. However, he said he liked his new place in San Diego with his mother much better [than his previous California residence] because it had more space. He said it had both a bedroom and living room area. He said he has told his mother he would rather live with her, and she had said it would be okay. [V.V.] did not know why his mother did not want to be near his father. …
>
> When I asked how he would feel if the judge said he should come back to Indiana, [V.V.] said he would feel good, but he would not feel good if his mother didn't come, and he would not feel good because then he wouldn't be able to see his California friends. He said if the judge said he should stay in California, he would feel the same way, but that wouldn't be great either because he wouldn't see his brother Hymme, and he wouldn't see Isaac and Jordan like he wants to do. He also wouldn't get to see his baby brother. …
>
> When I asked [V.V.] how he thought things should be settled, he said he still feels pulled in two different directions, but he did have some concern he might have to go to court himself. … Again, his ambivalence was present in that he thought that he might tell the judge he would like to stay in Indiana, but also tell the judge he would like to stay in San Diego if he got to see his friends there and could be with his mother.

Cross-Appellant/Appellee's App. at 143-44.

To reiterate, a child's preference is one of several factors a court must consider when striving to make a sound custody decision. Our legislature has specified that the

wishes of a child fourteen or older carry more weight than those of a younger child. Here, the court was provided with volumes of evidence, some of which favored Mother, some of which favored Father. Evidence regarding V.V.'s wishes was presented. Our review indicates not that the court disregarded V.V.'s wishes, but that the evidence regarding V.V.'s wishes was equivocal. In the end, the court was forced to weigh all the evidence as best it could and formulate a decision, knowing that no matter which decision it ultimately made, at least one party would be unhappy. We do not envy the court, nor can we say it failed to properly consider V.V.'s wishes.

V. Indianapolis Property

The parties do not dispute that the Indianapolis property was marital property or that the proceeds from its sale should go into the marital pot for division. *See* Ind. Code § 31-15-7-4. Where they part ways is on the question of valuation. Father contends that the court abused its discretion by failing to divide a portion of the proceeds from the sale of the Indianapolis property. He asserts that Mother received $72,630.62 from the sale yet deposited only $50,414.62 to escrow for division. In arguing for remand and correction, Father maintains that given the size of this marital estate, $22,216.00 is not an insubstantial discrepancy.

In valuing property in a dissolution action, the trial court decides the worth of an asset. *Trackwell v. Trackwell*, 740 N.E.2d 582, 583 (Ind. Ct. App. 2000), *trans. dismissed*. The trial court has broad discretion in determining the value of property. *Id.* at 585 n.5; *see also Frazier v. Frazier*, 737 N.E.2d 1220, 1225 (Ind. Ct. App. 2000). On review, we consider the evidence in a light most favorable to the judgment and will

disturb the court's valuation only for an abuse of discretion. *Trackwell*, 740 N.E.2d at 585 n.5; *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996) (also noting that reversal occurs only if the decision is clearly against the logic and effect of the facts and circumstances before the court). Where the trial court's valuation of property is within the range of values supported by the evidence, the court does not abuse its discretion. *Goossens v. Goossens*, 829 N.E.2d 36, 38 (Ind. Ct. App. 2005).

Finding #19 from the dissolution decree states that Mother sold the Indianapolis property and "received the sum of $50,414.62 which has been deposited in the trust account of attorney Richard Clem." The evidence most favorable to the judgment reveals the following. The original listing contract, dated May 8, 2006, contained a list price of $105,284. Appellant's App. at 64-68. Four days later, an amendment to the listing contract was made changing the listing price to $150,000, and a purchase agreement was signed for that same amount. *Id.* at 68-74. Under "further conditions," the purchase agreement stated: "Seller to a seller second." *Id*. at 73. The May 31, 2006 settlement statement noted $150,000 as the "gross amount due to seller," $72,630.62 as the cash amount due to seller, and $22,500 as "seller second mortgage." *Id.* at 61.

When asked why the list price was amended to $150,000, Mother replied, "Because the buyer is an investor and he had some kind of special financing that he was using and he needed to jumble the numbers around to make his financing work." Appellant's Add. to Br. at 22. Additional explanation of the transaction follows:

> Q. What did you net out of the sale of [the Indianapolis property]?
> A [Mother]. $50,414.62.
> Q. And that's the [Wells Fargo] check that was sent to you and is attached?

A. Yes.
Q. Now, it says to, look like the seller, $72,630.62. I know [] asked you where did that number come from? Why is that different from that? And on line 214 of the first page, it says seller's second mortgage. Now what is that?
A. I don't know. It has something to do with the owner's financing, the current owner's financing. They basically took $22,500 off of his side and added it to my side and then took it off his side. I don't know. But, you'll see it's on both sides. My understanding is that it just cancels each other out.
Q. I know none – at least I'm not a rocket scientist, and neither are you. Is it your representation to this Court that the money you received from the sale of the property is what's attached?
A. Yes.
Q. $50,414.62.
A. Yes.

Id. at 23. Mother clarified that it was Robert Sommers, the buyer, who asked the realtor to amend the list price from $105,284.00 to $150,000.00 so he could do "some kind of special financing on it." *Id*. at 26. She reiterated that the difference between the $105,000 and the $150,000 was due to Sommers' financing and "had nothing to do with the net sales price on the house." *Id*. In addition, the court heard that Mother purchased the Indianapolis property in 1995 for $45,000. The court also learned that in a May 2006 interrogatory, Mother estimated the Indianapolis property's value to be $42,500, but by the time of the dissolution hearing (which was held five months after the actual sale of the Indianapolis property), she revised her estimate of its value to $115,000.

Given the above, we can confidently say that the court's finding #19 is clearly within the realm of the evidence. Indeed we find additional support for the $50,414.62 valuation of sale proceeds in the following calculation:

Listing price:	$105,284.00
Settlement charges:	$ -12,750.00

First mortgage:	$ -37,674.48
01/06 to 05/06 taxes:	$ -355.61
Mother's closing costs:	$ -3,659.50
2006 taxes/2nd half:	$ -429.79
	$ 50,414.62

See Cross-Appellant/Appellee's Br. at 20 (noting that figures originated from settlement statement). Applying the appropriate standard, we cannot say the court abused its discretion when it valued the proceeds from the sale of the Indianapolis property at $50,414.62. To reach a different conclusion would be to reweigh evidence and/or judge credibility, tasks we may not perform as an appellate court. Furthermore, we note that the court allocated $29,498.62 of the $50,414.62 to Father, which in the end ensured a roughly even division of property.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.